United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1419

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1419

UNITED STATES OF AMERICA,

Appellant,

-against-

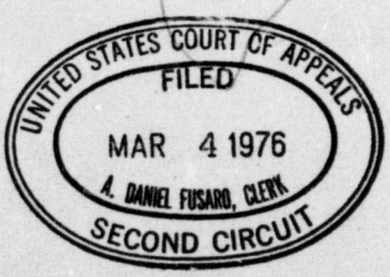
DANIEL MACKLIN,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE



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PRELIMINARY STATEMENT

The United States appeals from an order of the District Court for the Eastern District of New York (Mishler, Ch. J.), entered on November 17, 1975, which granted the motion of the defendant Daniel Macklin to dismiss the indictment 75 Cr. 563,

upon the ground that the statue of limitations bars any prosecution for the acts alleged therein.

Said indictment was filed in the office of the Clerk of the Court on July 18, 1975, which date was seven days short of five years and six months after the latest criminal act charged.

The District Court rejected the government's contention that the provisions of 18 U.S.C. Sect. 3288 applied so as to extend for six additional months beyond the expiration of the statute of limitations, the time within which this defendant could lawfully be indicted.

In so doing, the District Court relied upon its dismissal of an earlier indictment of this defendant, 73 Cr. 497 as a "nullity" because it was returned by a grand jury whose lawful term had expired.

STATEMENT OF FACTS

On January 29, 1975 the District Court (Mishler, Ch.J.) dismissed an earlier indictment against this defendant which had alleged charges identical to those embodied in this indictment, upon the ground that it was a nullity having been returned by a grand jury whose term had expired, citing U.S. v. Fein 504 F 2d 1170 (2nd Cir. 1974).

Although this fundamental deficiency in the grand jury was discovered well before the statute of limitations had expired, the government chose to contest the motion in the District Court rather than re-indict at that time.

The order of dismissal was affirmed in U.S. v. Macklin 523 F 2d 193 (2nd Cir. 1975) in which this court agreed with the District Court that the first indictment was void ab initio and that the court had no jurisdiction over the defendant since the grand jury which purportedly indicted him had no power to indict.

On September 17, 1975, the defendant-appellee moved to dismiss this second indictment on the ground that it was time barred. Chief Judge Mishler granted defendant-appellee's motion

to dismiss the indictment and in doing so rejected the government's contention that the provisions of 18 U.S.C. Sect. 3288 applied to extend for an additional six month period the time within which this defendant could lawfully be indicted. The District Court decision concluded that inasmuch as the so-called earlier indictment was a nullity and was void ab initio, the provisions of 18 U.S.C. Sect. 3288 do not apply.

ARGUMENT

POINT I

THE PROVISIONS OF TITLE 18 U.S.C SECT. 3288 DO NOT APPLY TO EXTEND THE STATUTE OF LIMITATIONS SO AS TO PERMIT A NEW INDICTMENT WITHIN SIX MONTHS FROM THE DISMISSAL OF AN INDICTMENT HELD TO BE A NULLITY AND VOID AB INITIO.

We agree with the government that "the issue before the Court is basically a simple one" of whether 18 U.S.C. Sect. 3288 will apply in this case.[1]

We also agree with the government that

> ...The statute of limitations on the offenses charged in the indictment has run. While 18 U.S.C. 3288, would permit a new indictment within six months from the date of the dismissal of the first indictment, if the dismissal is based on an "irregularity with respect to the grand jury", the holding of the District Court here suggests that the defect here at issue is something more than such an "irregularity", that the indictment is a nullity. As such there is substantial doubt that the provisions of Sect. 3288 would be applicable here. Indeed, in our petition for rehearing we suggested, relying on language in Wax v. Motley, 510 F. 2d 318 (C.A. 2, 1975), that, if the defect here is nothing more than "irregularity with respect to the

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1 See Appellant's brief U.S. v. Macklin 75-1419 at pg. 4

grand jury" (510 F. 2d at 320), it comes within the plain language of Rule 12 (b) (2) which provides that claims "based on defects in the institution of the prosecution" are waived unless timely raised. Yet, in response, the District Court reaffirmed its holding that the indictment was a nullity. 2

The language of U.S. v. Fein supra, dealing with the same grand jury which returned the earlier Macklin indictment, and the language of this court in U.S. v. Macklin supra, are clear beyond question that the purported actions of the grand jury, beyond its lawful term were jurisdictionally defective and fatally so.

As this Court stated in Macklin, quoting U.S. v. Johnson 123 F. 2d 111 (1941), "There is no such thing as a de facto grand jury in a Federal Court".

It follows, as this Court said in Fein supra, that an unauthorized extension of the term of a grand jury beyond 18 months is a defect which "goes to the very existence of the grand jury itself".

42 CJS Indictments & Informations Sect. 17 reiterates this basic concept, citing U.S. v. McKay, 45 F. Supp. 1007, Evaporated Milk Assoc. v. Roche, 130 F. 2d 843, 318 U.S. 741

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2 See Appellant's brief U.S. v. Macklin 75-1189 2nd para. pg. 2

and U.S. v. Fein 504 F. 2d 1170 (1974):

> "It is essential to the validity of an indictment that the Grand Jury which finds and returns it shall have jurisdiction...If the court had no jurisdiction, the indictment is a nullity...An indictment is a nullity where it is found by a grand jury at a term of court held unauthorized by law."

The language of 18 U.S.C. 3288 does not suggest that it will apply to extend the time within which a new indictment may be returned where the indictment is dismissed for so fundamental a jurisdictional incapacity as would render the first indictment a nullity.

The decisional law interpreting Sect. 3288 and its predecessor has required a narrow construction of its language. U.S. v. Moskowitz, 356 F. Supp. 331, (DCNY 1973), held that Sect. 3288 must be tightly construed, noting that "the language of the predecessor to 18 U.S.C. 3288 has been strictly interpreted, U.S. v. Durkee Famous Foods," 306 U.S. 68 (1939)

The pertinent portions of 18 U.S.C. 3288 state:

> "Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the Grand Jury...after the period prescribed by the applicable Statute of Limitations has expired, a new indictment

> may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment..."

Implicit in the District Court decision holding that 18 U.S.C. 3288 does not apply, is the finding and determination that the earlier purported indictment was not dismissed for an "error, defect or irregularity with respect to the grand jury" but rather because it was a nullity and thus no indictment at all.

POINT II

TITLE 18 U.S.C. 3288 WILL ONLY EXTEND THE STATUTE OF LIMITATIONS FOR AN ADDITIONAL SIX MONTHS TO PERMIT A NEW INDICTMENT WHERE A PRIOR INDICTMENT WAS DISMISSED FOR SOME TECHNICAL DEFECT OR IRREGULARITY, AND IS NOT A BLANKET SIX MONTH EXTENSION OF THE STATUTE OF LIMITATIONS.

The government brief states

> "...that Sect. 3288 was enacted to cover all situations when indictments are dismissed and the statute of limitations has expired." 3

This is an incorrect statement of both the legislative purposes for which Sect. 3288 was enacted, as well as the decisional law. The legislative intent and the decisional law are directly contrary to this suggested blanket six month extension of the statute of limitations.

1. Legislative Intent Appellant's brief excerpts a 1939 Attorney General's letter quoted in U.S. v. Durkee Famous Foods, 306 U.S. 68 (1939) as authority for its contention that Sect. 587 (now Sect. 3288) is a blanket extension of the statute of limitations. In doing so, it ignores the more recent 1963 interpretive memorandum of Attorney General Kennedy contained in

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3 See Appellant's brief U.S. v. Macklin 75-1419 bottom of pg.5

the Senate Judiciary Committee report 1414 contemporaneous with the 1964 amendments to what had become Sect. 3288. The 1964 change enlarged the ambit of Sect. 3288 to include informations as well as indictments. The Attorney General said "...dismissals of such prosecutions because of technical defects in the information should be accorded treatment similar to that accorded prosecutions instituted by indictments" (Emphasis added) 1963 U.S. Code Congressional and Administrative News 996.

The Attorney General assumed that prior to his memorandum, only indictments and not informations which had been dismissed for technical defects, would be extended by the statute.

2. Decisional Law The Courts have similarly held that the applicability of Sect. 3288 is limited to errors and technical defects and is not a blanket extension.

In U.S. v. Johnson, supra, the Court, in construing the predecessor to Sect. 3288, held it not applicable to an illegal extension of the grand jury because "the question presented is one of substance and not of form".

In Hattaway v. U.S. 304, F.2d pg. 5 (C.A. LA 1962) the Court said, "It is unthinking that Congress, in dealing with statutes designed to overcome the bar of limitations through the assertion of technical errors...would have legislated in terms of prosecutions initially commenced by constitutionally

incompetent methods". That Court approvingly quoted the Supreme Court of the United States in Smith v. U.S. 360 U.S. 1 (1959), that "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules".

The District Court in U.S. v. DiStefano 347 F. Supp. 442 held that Sect. 3288 and 3289 apply, "when an indictment is dismissed because of technical defects or irregularity in the grand jury". To like effect see U.S. v. McKay supra, and U.S. v. Wilsey 458 F. 2d 11 (1972).

The Court of Appeals for the Tenth Circuit has held that "This section was intended to apply to a case in which the first indictment was dismissed for technical reasons" U.S. v. Porth, 426 F. 2d 519 (1970).

The government, in order to come to its erroneous conclusion about the scope of Sect. 3288 must rely upon cases which construe the predecessor Sect. 587 and not Sect. 3288.

The predecessor Sect. 587 stated:

"Whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired..."

Whereas Sect. 3288 reads "Whenever an indictment is dis-

missed for any error, defect or irregularity with respect to the grand jury..."

It is quite obvious from a reading of the language that Sect. 3288 is more restrictive than its predecessor.

A reading of the cases cited by the government, including U.S. v. Strewl, 162 F. 2d 819, U.S. v. Main 28 F. Supp. 550 (1939) and U.S. v. Durkee Famous Foods supra lead to the inescapable conclusion that even under the predecessor Sect. 587 the Courts would limit the applicability of the six months extension only to those indictments returned by a grand jury authorized to return such an indictment and not as here to one without such power.

Appellant's brief claims that this "...Court has already indicated, that the defect here at issue is an "irregularity with respect to the grand jury" within the meaning of 18 U.S.C. Sect. 3288, Wax v. Motley 510 F. 2d 318, 320 (2nd Cir. 1975)".[4] This is clearly not the case

In point of fact this court held in Wax v. Motley that its decision rested upon its determination that the grand jury in that case was a Sect. 3331 grand jury whose term was extendable as an organized crime grand jury. Furthermore, the court specifically stated that if this were not the case, the

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4 See Appellant's brief U.S. v. Macklin 75-1419 at pg. 4

extension of the life of the grand jury would be illegal and the indictment therefore void citing as authority U.S. v. Fein supra.

The Fein and Macklin decisions have held that the illegal extension of the grand jury, "Left the court without jurisdiction", saying "We have found no authority which has upheld the validity of an indictment returned by a grand jury whose life had terminated under the clear language of the governing rule. It is therefore clear that the indictment handed down by the grand jury in the instant case is a nullity. Our conclusion that the indictment is a nullity necessarily implies that the court was without jurisdiction to hear the case .." U.S. v. Macklin supra at 196.

Since this court has earlier held that the defect in the first indictment was not merely a defect in the institution of the prosecution but one so fundamental as to have left the court without jurisdiction it must follow that the statute of limitations relating to the acts charged against the defendant herein expired on January 26, 1975, at a time when there was no jurisdictionally viable indictment in existence affecting him.

In this situation, there was thus no "defective" indictment to be saved by Sect. 3288. For the purposes of Sect. 3288 there was no indictment at all in existence against this defendant at

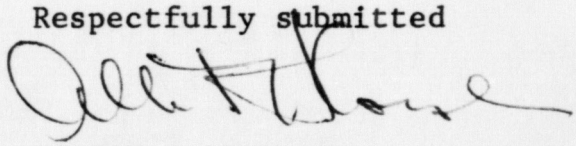
the time the statute of limitations expired as to the acts charged. The District Court thereupon correctly concluded that Sect. 3288 did not apply.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT, DISMISSING THE INSTANT INDICTMENT ON THE GROUND THAT ALL THE CHARGES ALLEGED IN THE COUNTS ARE TIME BARRED, SHOULD BE IN ALL RESPECTS AFFIRMED.

Dated: February 26, 1976

Respectfully submitted



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